



IT IS ORDERED as set forth below:

Date: October 14, 2010

A handwritten signature in black ink, appearing to read "W. H. Drake", is written over a horizontal line.

**W. H. Drake
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION**

IN THE MATTER OF:	:	CASE NUMBERS
	:	
JEFFREY PAUL HUNT,	:	BANKRUPTCY CASE
	:	NO. 09-12647-WHD
	:	
Debtor.	:	
_____	:	
	:	
GEORGIA LOTTERY	:	
CORPORATION,	:	
	:	
Plaintiff,	:	ADVERSARY PROCEEDING
	:	NO. 09-1095
v.	:	
	:	
JEFFREY PAUL HUNT,	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Defendant.	:	BANKRUPTCY CODE

ORDER

This matter comes before the Court on the “Motion for Summary Judgment” (hereinafter the “Motion”) filed by Georgia Lottery Corporation (hereinafter the “Plaintiff”).

The Motion arises in connection with an adversary proceeding initiated by the Plaintiff to determine the dischargeability of a debt owed by Jeffrey Paul Hunt (hereinafter the “Defendant”). The Defendant has not filed a response to the Motion, and, therefore, the Motion is deemed unopposed. *See* LBR 7007-1(c). This matter is a core proceeding, *see* 28 U.S.C. § 157(b)(2)(I), and will be disposed of in accordance with the following reasoning.

FINDINGS OF FACT

The Defendant is the sole owner and an officer of J & M Food Mart, LLC (hereinafter the "Company"), which does business as Shell Food Mart. Plaintiff's Statement of Undisputed Facts, ¶ 1, ¶ 23.¹ On or about March 15, 2000, the Defendant executed a contract with the Plaintiff, wherein the Company agreed to become a Georgia lottery retailer. *Id.* While the Defendant was the sole owner and an officer of the Company, the Company operated the Shell Food Mart, which activated, sold, and settled Georgia lottery tickets. *Id.* ¶ 2, ¶ 23. The Plaintiff terminated the Company's contract on August 19, 2009 due to the Company's failure to remit funds to the Plaintiff and/or to account for lottery tickets sold at the Shell Food Mart in the amount of \$8,369.12. *Id.* ¶ 9.

¹ Pursuant to BLR 7056-1(a)(2), the facts stated in the Plaintiff's Statement of Undisputed Facts are deemed admitted.

CONCLUSIONS OF LAW

A. Summary Judgment

In accordance with Federal Rule of Civil Procedure 56 (applicable to bankruptcy under FED. R. BANKR. P. 7056), this Court will grant summary judgment only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). A fact is material if it might affect the outcome of a proceeding under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The moving party has the burden of establishing the right of summary judgment, *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991); *Clark v. Union Mut. Life Ins. Co.*, 692 F.2d 1370, 1372 (11th Cir. 1982), and the Court will read the opposing party's pleadings liberally. *Anderson*, 477 U.S. at 249.

In determining whether a genuine issue of material fact exists, the Court must view the evidence in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Rosen v. Biscayne Yacht & Country Club, Inc.*, 766 F.2d 482, 484 (11th Cir. 1985). The moving party must identify those evidentiary materials listed in Rule 56(c) that establish the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986); *see also* FED. R. CIV. P. 56(e). Once the moving party makes a prima facie showing that it is entitled to judgment as a matter of law, the nonmoving party must go beyond the pleadings and demonstrate that there is a material

issue of fact which precludes summary judgment. *Celotex*, 477 U.S. at 324; *Martin v. Commercial Union Ins. Co.*, 935 F.2d 235, 238 (11th Cir. 1991).

B. Standards of Section 523(a)(4)

Section 523(a)(4) provides in pertinent part, a “discharge under section 727 . . . of this title does not discharge an individual from any debt . . . for fraud or defalcation while acting in a fiduciary capacity.” 11 U.S.C. § 523(a)(4). Thus, to establish nondischargeability pursuant to section 523(a)(4), the Court must find that (1) the Defendant acted as a fiduciary; and (2) that the debt at issue arose from the Defendant's commission of an act of fraud or defalcation during the performance of his fiduciary duties.

As to the first requirement, “[t]he Supreme Court has consistently interpreted ‘fiduciary’ in . . . a narrow and limited fashion.” *Blashke v. Standard (In re Standard)*, 123 B.R. 444, 452 (Bankr. N.D. Ga. 1991) (Bihary, J.). “Courts interpreting ‘fiduciary’ in section 523(a)(4) of the Bankruptcy Code have continued to hold that the trust on which the fiduciary relationship relies must be an express or technical trust which existed prior to the act creating the debt, not a trust *ex maleficio*, that may be imposed because of the very act of wrongdoing out of which the contested debt arose.” *Id.* at 453 (citing *Kraemer v. Crook*, 94 B.R. 207, 208 (N.D. Ga.1988), *aff’d*, 873 F.2d 1406 (11th Cir.1989)). Such a trust can be created by statute. *Id.*

In this case, the Georgia Lottery for Education Act, O.C.G.A. § 50-27-1, et. seq.

(hereinafter the "Act")² creates a statutory trust in favor of the Plaintiff over the proceeds from the sale of lottery tickets. *See In re Suwannee Swifty Stores, Inc.*, 266 B.R. 544 (Bankr. M.D. Ga. 2001). This statutory trust is an express trust and therefore imposes a fiduciary duty upon the retailer and its officers within the meaning of section 523(a)(4). *See In re Daniel*, 225 B.R. 249 (Bankr. N.D. Ga. 1998 (Murphy, J.)). Further, pursuant to the Act, it is the "lottery retailer and officers of a lottery retailer's business" who have the fiduciary duty to preserve and account for lottery proceeds. O.C.G.A. § 50-27-21(a). "Failure to remit lottery proceeds" constitutes a defalcation while performing this fiduciary duty. *In re Thompson*, 296 B.R. 563 (Bankr. M.D. Ga. 2003).

It is undisputed that the Defendant was an officer of the Company and that the Company operated a store that sold Georgia lottery tickets. Consequently, the Defendant owed a fiduciary duty to the Plaintiff with regard to the lottery tickets and their proceeds. It is also undisputed that the Company failed to remit funds to the Plaintiff from the sale or other disposition of Georgia lottery tickets in the amount of \$8,369.12. The Plaintiff is, therefore, entitled to judgment as a matter of law with regard to the nondischargeability of

² O.C.G.A. § 50-27-21(a) provides:

All proceeds from the sale of the lottery tickets or shares shall constitute a trust fund until paid to the corporation either directly or through the corporation's authorized collection representative. A lottery retailer and officers of a lottery retailer's business shall have a fiduciary duty to preserve and account for lottery proceeds and lottery retailers shall be personally liable for all proceeds.

the resulting debt.

CONCLUSION

Having found that the Plaintiff has satisfied the requirements of section 523(a)(4), the Court finds that the debt in the amount of \$8,369.12 owed by the Defendant, Jeffrey Paul Hunt, is nondischargeable. Accordingly, the Plaintiff's Motion for Summary Judgment is hereby **GRANTED**. A separate judgment in favor of the Plaintiff shall be entered.

END OF DOCUMENT